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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1165

WILLIAM A. EUBANK,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 46 Ill. 2d 383, 263 N.E. 2d 869 (1970).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

Petitioner relies on the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. After this Court's decisions in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), may testimony be admitted at trial regarding a pre-arrest confrontation for identification purposes while petitioner was unrepresented by counsel?

2. Did the failure of petitioner's trial counsel to object to testimony about the counselless pre-arrest identification constitute a waiver of petitioner's Sixth Amendment rights?

STATEMENT OF THE CASE

On December 21, 1966, Mrs. Yolanda Kuba was robbed in her own home in broad daylight by an armed man who was dressed as a telephone company employee but was otherwise undisguised (Tr. 9, 11, 38-39). Mrs. Kuba estimated that the robber stayed in her home for about 15 minutes; during most of that time she stared at him, in spite of his warnings to hold her face down (Tr. 14, 17). Shortly after the armed robber drove away, Mrs. Kuba called the Oak Lawn Police Department which quickly sent several officers to her house under the command of Captain (then lieutenant) O'Brien (Tr. 17-18). Mrs. Kuba immediately furnished a description of the robber (Tr. 18).

On January 6, or 7, 1967, Captain O'Brien brought Mrs. Kuba a container of 67 police photos; she viewed

several of the pictures before identifying one as being a photograph of the man who robbed her (Tr. 60). Mrs. Kuba next identified the armed robber on July 27, 1967, when Captain O'Brien and an F.B.I. agent accompanied her to a courtroom in the Federal Building in Chicago. On one of the benches sat the petitioner and another man, neither of whom were in the custody of the Oak Lawn Police Department (Tr. 61-65). Mrs. Kuba, who was the first person to enter the courtroom, stopped suddenly and identified the petitioner as the man who had robbed her (Tr. 22-23). No conversation occurred between petitioner and his visitors in the courtroom, nor were any directions given the petitioner; both parties simply stared at each other (Tr. 23). *Later* on the same day, Captain O'Brien *arrested* the petitioner for the crime committed on December 21, 1966 (Tr. 61-62).

Petitioner was subsequently indicted for armed robbery in August, 1967, and was found guilty after a bench trial on November 22, 1968. The trial judge, Hon. Richard J. Fitzgerald, sentenced petitioner to imprisonment in the state penitentiary for a term of not less than ten nor more than fifteen years. In explaining his finding of guilty, Judge Fitzgerald emphasized Mrs. Kuba's prolonged unobstructed observation of the petitioner in her home during the robbery, her ability to recall important details and her certainty that petitioner was the same man who robbed her on December 21, 1966:

> THE COURT: I might say that the Court was impressed by the method and manner in which this witness testified, her ability to recall facts. I also must consider the fact that she was in her home, in surroundings that were natural to her. She was within the cloistered walls of her home, as it were, and if it was out on the street in unfamiliar surround-

ings, if the witness or the defendant had struck or beaten her, if he had acted in such a manner which would have riled her, these are factors that the Court took into consideration.

Here we have a witness who is in her own home. She is impressed by the gentlemanlyness of the defendant. She is impressed by the gentle manner in which he handled her. She is impressed by his dainty walk, as it were.

MR. STEIN: None of which is in evidence that the defendant has.

THE COURT: But the Court unfortunately has been able to see the defendant walking in and about the court room and these factors would have a tendency of leading the Court to believe that this witness truly and correctly was able to identify the defendant and under the facts and the circumstances, the lighting conditions within the confines of her own home, the conditions under which the identification was met, the manner in which the defendant conducted himself all give rise to believe that the witness had ample opportunities, was in an exceptionally fine area in which to make an identification and having been with the defendant for fifteen minutes in a condition and atmosphere which at no time put her in fear for her life which would in any manner have a tendency to naturally affect her ability or her senses, although the defendant had a gun he didn't seem to brandish it in any manner which would put her in fear for her life. (Tr. 147-148)

The judge concluded his explanation with the following words: "However, as I say the single identification was in the Court's opinion sufficient to warrant the identification (finding) in this case." (Tr. 152). Judge Fitzgerald referred to the testimony about the pre-arrest confrontation only as a corroborating episode which bolstered the State's case but which was not essential to the finding of guilty (Tr. 141-143).

The remaining facts in the case are adequately set forth in the petition.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO RIGHT TO COUNSEL AT THE TIME OF PRE-ARREST INVESTIGATORY IDENTIFICATION CONFRONTATIONS.

Respondent submits that the facts of the present case do not raise the question of whether this Court's rulings in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967) should be limited to post-indictment confrontations or be extended to cover pre-indictment situations. The identification confrontation in the present case took place informally in a federal courtroom *before petitioner was even arrested* on the present charge and while the case was still in the investigatory stage (Tr. 61-62). At the time of the confrontation, no orders or questions were directed to the petitioner; Mrs. Kuba and petitioner simply stared at each other in silence (Tr. 23, 61-65). While seated in the federal courtroom, petitioner was certainly not in the custody of the Oak Lawn Police or any state officials. Indeed, it appears from the record that he was not in custody at all since he returned home that day and was found there when finally arrested (Tr. 62). Clearly, the facts here present the issue of whether there is a right to counsel in the *pre-arrest,* non-custodial investigatory stages before prosecution commences. Thus, the dispute between those courts applying *Wade* only after indictment has occurred and those courts which refuse to use indictment as the limiting criterion, is not directly relevant to a decision in the present case.

The Sixth Amendment itself guarantees the right to counsel only to an "accused" in "all criminal prosecu-

tions." Following from that phraseology, this Court's major decisions defining the right to counsel, including *Wade* and *Gilbert*, have been limited to situations where prosecution has actually begun in some form.

While reviewing its own string of right-to-counsel decisions in the course of the *Wade* opinion, this Court said: "In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings." 388 U.S. at 224. The opinion then discussed the group of cases headed by *Powell* v. *Alabama*, 287 U.S. 45, in which the Court had found the period from arraignment to trial to be "perhaps the most critical period of the proceedings . . .," id at 57, during which the accused "requires the guiding hand of counsel . . .," id at 69. Next cited were the cases following the rule of Powell, ie: *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *White* v. *Maryland*, 373 U.S. 59 (1963); and *Massiah* v. *United States*, 377 U.S. 201 (1964). In each of these situations, criminal prosecution was already under way by virtue of indictment, arraignment or preliminary hearing. Justice Brennan, speaking for the Court, then reviewed the right-to-counsel cases founded upon Fifth Amendment considerations, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The holding in *Escobedo* permitted counsel whenever the criminal process shifted from investigatory to accusatory; the defendant there had been in police custody when he requested counsel. In *Miranda*, the right to counsel at custodial interrogations was carefully formulated; it was to become effective whenever the police questioned a person after he had been "taken into custody or otherwise deprived of his freedom of action in any significant way[4]." 384 U.S. at 444. In footnote No. 4, Chief Justice

Warren explainted that this last quoted clause was what the Court had meant by an "accusatory" investigation in *Escobedo.*

All of these cases cited as precedents in *Wade* involved various critical stages of criminal prosecutions already in progress, as, of course, did *Wade* and *Gilbert* themselves. The defendant Wade had been indicted, arrested and given appointed counsel when the F.B.I. conducted a showup without notice to defense counsel. Gilbert had been indicted and had retained counsel when he was put in a police lineup without his lawyer being present. Thus, these two identification cases had progressed farther along the line of prosecution than many of the earlier right-to-counsel cases before they ran into Constitutional trouble over the absence of defense counsel. Therefore, it appears from all the above cases that an event such as an identification confrontation can be regarded as a "critical" stage requiring counsel only after a defendant has become the accused within the *Escobedo* and *Miranda* Rules. Certainly, none of this Court's landmark decisions have found a defendant's right to counsel existent prior to arrest, indictment or some other accusatory or custodial event which signals the beginning of a prosecution.

Several state and federal courts have concluded that a defendant has no right to counsel during investigatory identification confrontations occurring prior to arrest. Illinois is one such state; its position on this subject is not founded entirely upon *People* v. *Palmer,* 41 Ill. 2d 571, 244 N.E. 2d 173 (1969), a case where the defendant had been confronted by the victim between arrest and indictment, but rather is contained in *People* v. *Cesarz,* 44 Ill. 2d 180, 255 N.E. 2d 1, 4 (1969), a case quite similar to

the present one. The defendant Cesarz was among 50 or 60 people around a Holiday Inn pool when a witness to a murder-robbery was brought to the pool and asked if anyone there fitted his composite picture of the murderer. The witness picked out Cesarz and police asked him to come inside where the witness definitely identified him; Cesarz was then arrested. In rejecting a *Gilbert* challenge to the identification evidence, the Supreme Court of Illinois said: "It would be strange indeed to require counsel in a case such as this where defendant had not been placed under arrest and was unaware (at the outset) that he was being observed." 255 N.E. 2d at 4.

In *United States* v. *Davis*, 399 F. 2d 948, 951 (2nd Cir. 1968), *cert. denied*, 393 U.S. 987 (1968), the defendant was in custody for being a pedestrian on a Thruway when the officer, suspecting the defendant of driving a stolen car, presented him to a toll booth attendant and asked if the attendant had seen the young man driving a car earlier. This confrontation occurred without the presence of counsel but before the stolen auto charge had been made. The Court of Appeals in affirming the conviction said that *Wade* and its companion decisions did not intend to cover the situation where a confrontation occurred before the accusatory stage had been reached as depicted in *Escobedo* and *Miranda*. The court found that the mere fact of custody for an unrelated crime did not automatically trigger the Sixth Amendment right to counsel; also, mere suspicion of guilt did not amount to accusation in the *Escobedo-Miranda* sense. In the opinion, Judge Friendly stated that policemen should not be prevented from reasonably investigating their suspicions through such confrontations.

A District Court similarly refused to extend the *Wade* rule to a pre-arrest identification confrontation in *Bratten*

v. *State of Delaware*, 307 F. Supp. 643, 646 (D. Del. 1969). Police had summoned the robbery victim to a public inn where four Negroes had been involved in a minor auto accident. After asking Bratten to remove his sun glasses, the victim identified him and he was arrested. The court declined to apply the *Wade* trilogy because the confrontation took place before defendant was accused of the crime. The same conclusion had been reached in the case on appeal by the Supreme Court of Delaware. *Bratten* v. *State*, 257 A. 2d 230, 231 (1969).

Two state courts have decided cases which are almost carbon copies of the present case. In *State* v. *Moore*, 269 A. 2d 534, 536 (N.J. Super. Ct., App. Div., 1970), *N.J. cert. denied*, 57 N.J. 210, 271 A. 2d 5 (1970), the victim of a street robbery was on his way to sign a complaint on the day after the crime when he was told that some people arrested earlier at the same address for another charge were sitting in an adjoining courtroom. The defendant and at least nine others were in the courtroom; defendant had not been charged with the street robbery and had come to court that morning from his uncle's home. The victim made the identification, the defendant was arrested and the confrontation was brought out in testimony at trial. Defense counsel did not object to the identification testimony, but the court still considered the *Wade* challenge on its merits, although noting that defendant had waived his right to object. The court decided the issue in the following words:

> "Defendant misconceives not only the scope of *Wade* doctrine but also the issue we are called upon to decide in this case. That issue is not, as defendant's argument assumes, whether the *Wade* rule requiring the assistance of counsel should be applied to pre-indictment confrontations as well as post-indictment confrontations.

> Here we need not reach or decide that question to which the courts have given divergent answers . . . .
>
> Where, as here, the out-of-court identification takes place during the investigatory phase of the case, before the defendant is arrested or taken into police custody, *Wade* does not in any event apply; the presence of counsel is not required.*" (Footnote omitted.) 269 A. 2d at 536.

The Supreme Judicial Court of Maine reached a similar result in *State* v. *Butler,* 256 A. 2d 588, 590-591 (1969).

Other decisions upholding non-custodial or in-the-field confrontations against challenges based upon the *Wade* trilogy are *Bradford* v. *State,* 164 S.E. 2d 264 (Ga. App. 1968), *cert. denied,* 394 U.S. 1020 and *Commonwealth* v. *Bumpus,* 354 Mass. 494, 238 N.E. 2d 343 (1968), *cert. denied,* 393 U.S. 1034, *reh. denied,* 393 U.S. 1112. See also *State* v. *Tafoya,* 454 P. 2d 145, 147 (Ariz. Supreme Ct. 1969), holding that a post-information showup without counsel, preceded by photographic identification, is not a critical stage of the prosecution and therefore its admission into evidence was not prejudicial error.

Respondent agrees with the many decisions cited above that all identification confrontations are not *per se* a "critical stage" of a criminal proceeding. Those confrontations occurring before arrest, as the one in the present case, are especially outside the "critical" area since no prosecution can be said to have begun during this early investigatory stage. If the Court were to prohibit pre-arrest identification confrontations without counsel, then by logical extension even on-the-scene identification confrontations would become impossible and police investigative procedures would be unduly restricted. In *Simmons* v. *United States,* 390 U.S. 377, 384 (1968), this Court found initial identification by photograph to be

such a valuable investigative tool, "both for apprehending offenders and for sparing innocent suspects the ignominy of arrest," that it could not be prohibited as being hazardous to the suspect, except in the most suggestive circumstances. This argument can be made even more strongly in favor of personal identification confrontations prior to arrest. Mindful of the deep public interest in effective criminal law enforcement, respondent submits that petitioner had no right to counsel in his confrontation with Mrs. Kuba and that his petition should therefore be denied.

(Petitioner does not question the integrity of his identification confrontation under *Stovall* v. *Denno,* 388 U.S. 293 (1967). However, the Illinois Supreme Court applied *Stovall* to the present case in rendering their opinion and found that the confrontation was not unduly suggestive. *People* v. *Eubank,* reproduced in Petition, App. 4-5.

II.

IF THE RIGHT TO COUNSEL DID EXTEND TO PRE-ARREST IDENTIFICATION CONFRONTATIONS, THEN TESTIMONY ABOUT THE CONFRONTATION IN THE PRESENT CASE WOULD ONLY AMOUNT TO HARMLESS ERROR.

This Court has stated that testimony concerning an improper identification confrontation can escape the consequences of the *per se* exclusionary rule if the testimony is "'harmless beyond a reasonable doubt.' *Chapman* v. *State of California,* 386 U.S. 18, 24." *Gilbert* v. *California,* 388 U.S. at 274. In the present case, Mrs. Kuba, the victim, viewed the armed robber at close range in broad daylight for about fifteen minutes (Tr. 14, 17).

She recalled specific details of the robber's dress and mannerisms (Tr. 38, 39), and she picked petitioner's picture out of a group of 67 police photographs long before the confrontation took place in the federal courtroom (Tr. 60). The trial judge, as the trier of fact sitting without a jury, gave great weight to Mrs. Kuba's ability to remember details about the robber which could not have come from the confrontation. (See excerpt from judge's findings reproduced in the Statement of the Case, page 3.) In his own words, Judge Fitzgerald considered the confrontation on July 27, 1967, only as "corroborating evidence," and, under Illinois law, corroborating evidence was not needed to support Mrs. Kuba's identification and the court's judgment (Tr. 141-143). Thus, if petitioner's right to counsel had been violated, the resulting testimony was non-essential evidence and its admission constituted harmless error beyond a reasonable doubt.

III.

PETITIONER IS PRECLUDED FROM RAISING THE QUESTION OF HIS RIGHT TO HAVE COUNSEL AT THE PRE-ARREST CONFRONTATION SINCE HE NEVER PRESENTED THE QUESTION TO THE TRIAL COURT FOR ITS DETERMINATION.

Petitioner's trial counsel did not move to suppress evidence of the pre-arrest identification confrontation, and did not object to testimony about the event (Tr. 6-27, 55-65, 67-73, 131-146). Nor did his second defense lawyer raise this issue in the motions to vacate judgment and motions for a new trial (C. 35-67). There is no indication either in the record or in the petition that the two lawyers retained by petitioner were ignorant of the *Wade* trilogy or so lax in performing their duties that they

negligently failed to mention these cases to the trial court. In the absence of evidence to the contrary, we must presume that petitioner's two lawyers made a proper professional judgment not to include a *Gilbert* challenge in their trial and post-trial strategies. Such a determination is binding on the defendant-petitioner. *Henry* v. *Mississippi,* 379 U.S. 443, 451-452 (1965); *United States* v. *Marcello,* 423 F. 2d 993, 1005 (5th Cir. 1970), *cert. denied,* 90 S. Ct. 2172 (1970).

In *Henry,* this Court held that if the state's insistence on compliance with a procedural rule serves a legitimate state interest, then the defendant's procedural defaults may constitute waiver of his federal rights. Finding that the Mississippi contemporaneous objection rule clearly served a legitimate state interest, this Court observed that the purpose of the rule might have been satisfied in that case by the petitioner's motion for a directed verdict which notified the trial judge of the erroneous admission of the officer's testimony. This issue was not specifically decided, however, and the case was reversed and remanded because the record suggested that defense counsel, as part of their strategy, may have deliberately by-passed the opportunity to make timely objections. The by-pass issue had to be determined before final decision on the waiver question could be made; if deliberate by-pass were found, then petitioner's Fourth Amendment rights would have been waived, according to the *Henry* opinion.

In the present case, there may actually have been a deliberate by-pass of the *Gilbert* issue. Regardless, Illinois too has a legitimate interest in demanding that trial errors involving Constitutional rights be brought to the trial judge's attention. Speaking of this rule, the Supreme Court of Illinois has said: ". . . compliance

therewith focuses the trial court's attention on alleged error, thereby quite possibly obviating the necessity for appeals and reversals." *People* v. *French,* 33 Ill. 2d 146, 149 (1965), *cert. denied,* 384 U.S. 1016. Today, with the system of criminal justice subjected to such great stresses, the state's interest in limiting whenever possible the merry-go-round procedure of trial, reversal and retrial is even stronger. In the present case, unlike *Henry,* defense counsel *never* raised the *Gilbert* challenge *at any time* before an appeal was taken. By attempting to raise this question on appeal, petitioner is seeking to nullify the legitimate state interest in orderly procedure—an attempt not allowable under this Court's decision in *Henry.*

The Sixth Amendment right defined in the *Wade* trilogy is subject to waiver just as is the Fourth Amendment right involved in *Henry.* Several courts have already held that the question of improper identification of a defendant can be waived by failure to object or request a hearing. *Reese* v. *State,* 457 S.W. 2d 877 (Tenn. Ct. of Crim. App. 1970); *Wright* v. *State,* 457 S.W. 2d 55 (Texas Ct. of Crim. App. 1970); *Poole* v. *Commonwealth,* 176 S.E. 2d 821 (Va. Sup. Ct. 1970); *Williamson* v. *Commonwealth,* 175 S.E. 2d 285 (Va. Sup. Ct. 1970).

CONCLUSION

For the above reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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